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# Restoration of Rights to Felons in California

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# Restoration Of Rights To Felons In California

The restoration of civil rights to persons who have been convicted of felonies in California is not as complete as it seems.

The loss of rights caused by a felony conviction continues long after the formal punishment has been served. This was recognized by the United States Supreme Court when it held that the fact that a defendant's sentence had been served did not render an appeal from a criminal conviction moot.<sup>1</sup> The court noted that the adverse "collateral consequences" that flow from conviction would insure that the convict has a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."<sup>2</sup>

The continuing effects of a criminal conviction take the form of loss of civil rights as well as social prejudices by the public in general. To the extent that it is not necessary to protect the public, the loss of these rights may unduly hamper the rehabilitation of ex-convicts as useful citizens and affect the rate of recidivism.<sup>3</sup>

There are remedies that remove some of the disabilities that are legally imposed as a result of felony conviction.<sup>4</sup> But these remedies are not always effective in removing all of the collateral consequences that flow from conviction.

In examining the rights of felons in California, this comment considers the status of ex-convicts, the present remedies for restoration of rights, and a proposal to make the present remedies more meaningful.

## I. THE STATUS OF PERSONS WITH A RECORD OF FELONY CONVICTION

The California Constitution authorizes the loss of certain rights as a result of a criminal conviction and there are several statutes which impose restrictions on persons with a record of criminal conviction. One statute that, as a part of punishment, imposes only temporary re-

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1. *Carafas v. LaValley*, 391 U.S. 234, 237 (1968); *cf. Sibron v. New York*, 392 U.S. 40, 51 (1968).

2. *Id.*

3. Cal. Assembly Subcomm. on Correctional Facilities, 1960 Report; S. RUBIN, *THE LAW OF CRIMINAL CORRECTION*, 612 (1963) [hereinafter cited as RUBIN].

4. CAL. PEN. CODE §§ 1203.4, 4852.01 *et seq.*

strictions on the rights of a person who has been convicted of a felony is section 2600 of the California Penal Code. This statute provides that "a sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment."<sup>5</sup> After the convicted felon is incarcerated, the California Adult Authority has discretion to restore to the convict such civil rights as it may deem proper, except the right to vote, hold public office, act as a trustee, or give a general power of attorney.<sup>6</sup>

Certain rights are not taken away by this statute. For example, a prisoner retains the right to inherit real or personal property<sup>7</sup> and is capable of making a will.<sup>8</sup> He can convey real property and is competent to testify as a witness in a civil or criminal proceeding.<sup>9</sup>

None of the prisoner's duties, obligations or liabilities are affected by this statute.<sup>10</sup> He can be prosecuted and sued<sup>11</sup> although generally he can not bring a civil suit himself.<sup>12</sup> He is liable for debts owing on his existing contracts<sup>13</sup> although he is not capable of making a new contract.<sup>14</sup>

The effect of this statute continues during parole since the convict is constructively still a prisoner.<sup>15</sup> Thus a parolee can be the subject of what would otherwise be an unlawful search and seizure<sup>16</sup> and a parolee is incapable of making a contract,<sup>17</sup> unless the right has been restored to him by the Adult Authority.

This statute is the last vestige, in California, of the common law concept of civil death by which the legal status of a convict was equal to that of a naturally dead person.<sup>18</sup> This statute is punitive in nature rather than for the protection of society, and as such it is narrowly construed to apply only to persons sentenced to imprisonment in state in-

5. CAL. PEN. CODE § 2600.

6. CAL. PEN. CODE § 2600. *But see* CAL. PEN. CODE § 3054 which apparently permits the Adult Authority to restore to the felon the right to give a general power of attorney. *See* Adult Authority Resolution No. 199.

7. CAL. PEN. CODE § 2600.

8. CAL. PEN. CODE § 2603.

9. *Id.*

10. Comment, *Convicts—Loss of Civil Rights—Civil Death in California*, 26 So. CAL. L. REV. 425, 427 (1953).

11. *People v. Lawrence*, 140 Cal. App. 2d 133, 135 (1956); *People v. Hayes*, 9 Cal. App. 2d 157, 160 (1935).

12. *Ex parte Maro*, 248 P.2d 135, 138 (1952); but state prisoner may bring an action under the Federal Civil Rights Act, *Weller v. Dickson*, 314 F.2d 598, 601, *cert. denied*, 375 U.S. 845 (1963).

13. *In re Nerac's Estate*, 35 Cal. 392, 396 (1868).

14. CAL. CIV. CODE § 1556.

15. 15 OP. CAL. ATT'Y GEN. 53, 54 (1950).

16. *People v. Hernandez*, 229 Cal. App. 2d 143, 150 (1964).

17. *Rosman v. Cuevas*, 176 Cal. App. 2d 867, 869 (1960).

18. CAL. PEN. CODE § 2600; Comment, *supra* note 10.

stitutions.<sup>19</sup> And the trend is towards an even more limited application of civil death.<sup>20</sup>

It should be noted that section 2600 applies to all persons sentenced to imprisonment. Thus it applies to persons convicted of a felony, sentenced to prison and actually incarcerated. And it applies to those persons convicted of a felony and sentenced to prison, but whose sentence was suspended—*i.e.*, those persons that may have been granted probation without ever having been incarcerated.<sup>21</sup> However, section 2600 would not apply to those persons who are found to be guilty of a felony but given probation without entry of judgment, although those persons in this category are still considered to be convicted felons for purposes of the statutes imposing more permanent restrictions on rights.<sup>22</sup>

At any rate, the effects of section 2600 terminate when the felon is finally discharged from his status as a prisoner and from the control of the Adult Authority.<sup>23</sup> But restrictions on the right to vote and the right to hold public office continue because of constitutional and other statutory provisions.<sup>24</sup>

The California Constitution provides that no person convicted of any infamous crime and no person convicted of embezzlement or misappropriation of public money shall ever exercise the privileges of an elector.<sup>25</sup> Prior to the case of *Otsuka v. Hite*,<sup>26</sup> an infamous crime was defined to include any felony.<sup>27</sup> But *Otsuka* recognized that some felonies were in no way related to a person's capacity as an elector, and therefore limited the definition of infamous crimes to those crimes involving moral corruption and dishonesty, thereby branding the persons committing such crimes as a threat to the integrity of the elective process.

This definition of infamous crime is still criticized by some since the determination of which crimes are infamous is made by the officer in charge of voter registration in each county and thus may vary from county to county.<sup>28</sup> Also the usual procedure is that persons registering to vote are required to sign a statement indicating that they have

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19. *Hayashi v. Lorenz*, 42 Cal. 2d 848, 852 (1954); 18 OP. CAL. ATT'Y GEN. 275 (1951).

20. Comment, *supra* note 10, at 433.

21. 22 OP. CAL. ATT'Y GEN. 39, 40 (1953).

22. *Id.*

23. Telephone interview, State Dept. of Corrections, Sacramento, Calif., Feb. 9, 1971.

24. *E.g.*, CAL. CONST. art. II, § 1.

25. *Id.*

26. 64 Cal. 2d 596, 599 (1966).

27. *In re Westenberg*, 167 Cal. 309, 319 (1914); *Truchon v. Toomey*, 116 Cal. App. 2d 736, 738 (1953).

28. Notes and Comments, *The Ex-Convict's Right to Vote*, 40 So. CAL. L. REV. 148 (1967).

not "been convicted of any crime which would disqualify [them] from voting."<sup>29</sup> Since the question itself does not state which crimes are disqualifying, a person might naturally believe that any crime is disqualifying. If the ex-convict asks, the registrar is under a legal duty to inform him that not all crimes are disqualifying.<sup>30</sup> And if an ex-convict is denied the right to vote, he can always appeal to the superior court of the county for a judicial determination as to whether the crime committed is in fact infamous.<sup>31</sup> If never sentenced to prison and if the crime convicted of is not considered to be infamous, the convicted felon will not lose his right to vote.<sup>32</sup>

The statutes which restrict the right of ex-convicts to hold public office<sup>33</sup> are based on provisions in the California Constitution such as article 20, section 11, which authorizes legislation to exclude persons convicted of bribery, perjury, forgery, malfeasance in office or other high crimes from holding office, serving on juries, and from the right to vote.<sup>34</sup> One statute that carries out this authority provides that no person convicted of "malfeasance in office or any felony or other high crime"<sup>35</sup> is competent to act as a petit or grand juror.<sup>36</sup> Another statute provides that conviction of any felony disqualifies a person from holding office as a peace officer.<sup>37</sup> A person is also disqualified from ever holding office if he has committed certain specified crimes such as perpetrating a fraud on the voting process, bribery, falsification of accounts, embezzlement, and dueling.<sup>38</sup> However, if an ex-convict does not come under one of these special statutes, his right to hold public office is not clear. The Government Code provides that the status of an elector includes the right to hold public office.<sup>39</sup> Thus it would seem that, following *Otsuka*, persons not convicted of infamous crimes and not coming under one of the special statutes should automatically regain the right to hold public office upon final release from prison. However, there is no express statutory provision to this effect.

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29. CAL. ELECTIONS CODE §§ 310, 321; *Review of Selected 1970 California Legislation*, 2 PAC. L.J. 275, 470 (1970).

30. CAL. ELECTIONS CODE §§ 321.5, 321.7.

31. CAL. ELECTIONS CODE § 350; 53 OP. CAL. ATT'Y GEN. 43 (1970).

32. 22 OP. CAL. ATT'Y GEN. 39 (1953).

33. Public office has been defined as the

right, authority and duty, created and conferred by law, the tenure of which is not transient, occasional or incidental, by which for a given period an individual is invested with power to perform a public function for public benefit.

People *ex rel.* Chapman v. Rapsey, 16 Cal. 2d 636, 640 (1940).

34. See also CAL. CONST. art. XII, § 19 and art. XX, § 10.

35. CAL. CODE CIV. PROC. § 199.

36. CAL. CODE CIV. PROC. § 199; CAL. PEN. CODE §§ 893, 1072.

37. CAL. GOV'T CODE § 1029.

38. CAL. GOV'T CODE § 1021; CAL. ELECTIONS CODE § 14692; CAL. PEN. CODE §§ 68, 74, 86, 88.

39. CAL. GOV'T CODE § 274.

The restoration of the right to act as a fiduciary, as well as the right to vote and right to hold public office, is specifically excluded from those rights subject to restoration by the Adult Authority under section 2600 of the Penal Code. It is not clear however whether this right is automatically restored to an ex-convict. It seems to have been thought in the past that the right to vote, hold public office, and act as a fiduciary were not automatically restored to ex-convicts.<sup>40</sup> But since the effects of section 2600 terminate after completion of sentence, since there is no other statutory or constitutional reference to a felon's capacity to act as a fiduciary<sup>41</sup> and since the advent of *Otsuka*, it seems reasonable to conclude that this right is also automatically restored to an ex-convict, at least if the crime for which conviction occurred is not considered to be infamous.

In addition to these disabilities there are other legally imposed disadvantages flowing from a felony conviction. Although all persons convicted of crimes are competent to testify in both civil and criminal proceedings,<sup>42</sup> evidence that the person has been convicted of a felony can be introduced to impeach the credibility of that person.<sup>43</sup> The effect of this provision is to discourage an ex-convict from taking the stand, as a witness or as a party in a civil or subsequent criminal proceeding. Although it has been held unconstitutional in a criminal proceeding to comment on the failure of a defendant to take the stand in his own behalf,<sup>44</sup> if he does take the stand to defend himself, his prior convictions can be used to attack his credibility.<sup>45</sup>

The fact of a prior conviction can also be used against an ex-convict in his subsequent conviction of another crime.<sup>46</sup> For example, there are provisions which increase the punishment for a second offense.<sup>47</sup> Another disability flowing from a felony conviction is that it is a crime for any person who has been convicted of a felony to own or possess a concealable firearm.<sup>48</sup> Moreover persons convicted of certain crimes may be required to register with local law enforcement agencies.<sup>49</sup> While some believe that registration requirements are a means of harassment and do not prevent or detect crime,<sup>50</sup> statutes require that

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40. Kingsley, *The Work of the 1943 Legislature—Criminal Law*, 17 So. CAL. L. REV. 35, 43 (1943).

41. *But cf.* CAL. PROB. CODE § 401 which renders a person convicted of an infamous crime incompetent as an executor.

42. CAL. PEN. CODE § 2603.

43. CAL. EVID. CODE § 788; *People v. O'Brand*, 92 Cal. App. 2d 752, 755 (1949).

44. *Griffin v. California*, 380 U.S. 609, 612 (1965); CAL. EVID. CODE § 1101.

45. CAL. EVID. CODE § 788.

46. *E.g.*, CAL. PEN. CODE §§ 644, 667, 668, 669.

47. *Id.*

48. CAL. PEN. CODE § 12021.

49. CAL. PEN. CODE § 290; CAL. HEALTH & SAFETY CODE § 11850.

50. RUBIN, at 630.

certain sex offenders<sup>51</sup> and narcotics offenders<sup>52</sup> register with their local law enforcement agencies. These registration requirements are based on the belief that such persons are likely to repeat their crimes.<sup>53</sup> However, this assumption apparently ends after five years in the case of the narcotics offenders since their duty to register terminates five years after final release from prison and parole or probation.<sup>54</sup>

Furthermore, conviction of a felony may affect a person's employment in any of the nearly forty businesses and professions which require a license or certificate from the state.<sup>55</sup> Most of the licensing agencies have statutory authority to revoke or suspend a license if the licensee is convicted of a felony and/or a crime involving moral turpitude.<sup>56</sup> Conviction of any felony will subject a person to suspension or revocation of license in such businesses as a mineral and oil brokerage,<sup>57</sup> yacht and ship brokerage,<sup>58</sup> cleaning, dyeing and pressing business,<sup>59</sup> and the training of guide dogs for the blind.<sup>60</sup> Conviction of any crime involving moral turpitude will subject a person to discipline if he has a license as, for example, an attorney,<sup>61</sup> a barber,<sup>62</sup> a cosmetologist,<sup>63</sup> or a funeral director and embalmer.<sup>64</sup>

Although it has continually been held that these administrative disciplinary proceedings are not imposing further penalties but rather attempting to select a nonpunitive standard of fitness for the occupation,<sup>65</sup> licensing discipline may in fact be unduly punitive when the crime committed is in no way related to the moral standards of the profession regulated.<sup>66</sup> For example, the conviction of any felony would not seem to necessarily render a person unfit to run a cleaning, dyeing and pressing business.

Moral turpitude has been defined as conduct that is "contrary to jus-

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51. CAL. PEN. CODE § 290.

52. CAL. HEALTH & SAFETY CODE § 11850.

53. 2 B. WITKIN, CALIFORNIA CRIMES, § 966 (1963).

54. CAL. HEALTH & SAFETY CODE § 11853.

55. Booth, *Restoration of Rights, CONTINUING EDUCATION OF THE BAR, CALIF. CRIMINAL LAW PRACTICE II*, 641-647 (1969) [hereinafter cited as BOOTH, C.E.B.].

56. 28 out of 39.

57. CAL. BUS. & PROF. CODE § 10562(b).

58. CAL. BUS. & PROF. CODE § 8955(b).

59. CAL. BUS. & PROF. CODE § 9540.3(d).

60. CAL. BUS. & PROF. CODE § 7211.9(d).

61. CAL. BUS. & PROF. CODE § 6101.

62. CAL. BUS. & PROF. CODE § 6576.

63. CAL. BUS. & PROF. CODE § 7431(j).

64. CAL. BUS. & PROF. CODE §§ 7691, 7708.

65. *Ready v. Grady*, 243 Cal. App. 2d 113, 116 (1966); *In re Phillips*, 17 Cal. 2d 55, 132 A.L.R. 644 (1941). *But see Sautter v. Contractors Board*, 124 Cal. App. 2d 149 (1954).

66. Notes and Recent Decisions, 44 CAL. L. REV. 403 (1956); Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 541 (1962); and compare, *Otsuka*, 64 Cal. 2d 596, noting that some crimes are in no way related to voting process.

tice, honesty, modesty, or good morals."<sup>67</sup> Most licensing agencies consider conviction of a felony to be prima facie evidence of moral turpitude without further inquiry into the relation of the crime to the business or profession regulated.<sup>68</sup> Some of the licensing agencies, however, only provide for discipline when the crime committed is one arising out of or related to the particular profession.<sup>69</sup> Examples of such agencies are those regulating accountants,<sup>70</sup> architects,<sup>71</sup> insurance brokers<sup>72</sup> and contractors.<sup>73</sup>

In addition to disciplining persons who already are licensed, these agencies are authorized to deny a license to applicants who do not possess good moral character.<sup>74</sup> Since good moral character is generally defined "in terms of an absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude,'" <sup>75</sup> a record of conviction of a felony is generally considered to be evidence of bad moral character.<sup>76</sup> The determination of whether or not a license will be granted is made in each case by the particular licensing boards, which indicate that they consider each case individually, considering all of the surrounding circumstances.<sup>77</sup> It is clear, however, that an ex-convict applying for any license will be subjected to special and thorough scrutiny before he is granted a license or granted reinstatement of his license and it has been held reasonable to deny a license or deny reinstatement for lack of good character on the basis of a prior felony conviction alone.<sup>78</sup>

Generally, in practice, whenever an applicant has a record of felony conviction, the agency may do one of two things. It may deny the license, giving the applicant a certain number of days within which to reply. If the applicant replies within the given time, he is entitled to an administrative hearing before the particular board. Or the agency may request the applicant to appear for an administrative hearing before the

67. *In re McAllister*, 14 Cal. 2d 602, 603 (1939); *In re Hatch*, 10 Cal. 2d 147, 150 (1937).

68. Telephone interviews: Board of Barber Examiners, Board of Accountants, Funeral Directors & Embalmers Board, Chiropractic Board, Pharmacy Board, Dry Cleaners Board, Cosmetology Board, Optometry Board, Board of Registration for Professional Engineers; Sacramento, Calif., March, 1971.

69. Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 547 (1962).

70. CAL. BUS. & PROF. CODE § 5100(a), (b), (i).

71. CAL. BUS. & PROF. CODE § 5577.

72. CAL. INS. CODE §§ 1688(m), 1669(a), (b).

73. CAL. BUS. & PROF. CODE § 7123.

74. E.g., CAL. BUS. & PROF. CODE §§ 1000-5 (chiropractors), 1628 (dentists), 2866, 2877 (vocational nurses—applicant shall have committed no act that would be grounds for discipline; conviction of felony or crime involving moral turpitude is grounds for discipline), 6545 (barbers).

75. *Hallinan v. Comm. of Bar Examiners*, 65 Cal. 2d 447, 452 (1966).

76. See note 69 *supra* at 533; Telephone interviews, *supra* note 68.

77. Telephone interviews, *supra* note 68.

78. *Hirsch v. City & County of San Francisco*, 143 Cal. App. 2d 313 (1956); 22 A.L.R.2d 255 (1952).



agency makes its decision on whether to accept or deny the application. In either instance, the burden of showing good moral character is on the applicant.<sup>79</sup>

When a licensee is convicted of a felony and the licensing agency intends to suspend or revoke the license, the licensee is also entitled to an administrative hearing. In this case, however, the burden of showing a lack of good moral character is on the board.<sup>80</sup>

Any decision of these administrative hearings is subject to judicial review. But since these administrative boards are given wide discretion, the applicant has the burden of showing that the board's findings were not supported by the evidence in order to obtain a reversal of an adverse decision.<sup>81</sup>

State civil service employment may also be denied<sup>82</sup> or terminated<sup>83</sup> for conviction of a felony, although it is maintained that a non-discriminatory practice of examining all the surrounding circumstances, including the relation of the crime to the particular position, is used.<sup>84</sup> The actual practice is almost identical to the practices of licensing agencies, with the State Personnel Board performing the administrative duties.

As the state, through its agencies, continues to question an ex-convict's credibility and character after his formal punishment has ended, public opinion also adds to the effects of having been convicted of a felony. The most harmful effect in terms of rehabilitation of ex-convicts is discrimination in private employment.<sup>85</sup> Although there seem to be no meaningful studies measuring the actual amount of discrimination practiced by private employers towards ex-convicts, it is generally agreed that many employers are reluctant to hire such persons.<sup>86</sup> However, the Employment Office of the State Department of Human Resources Development has adopted a positive policy of encouraging em-

79. Telephone interviews, *supra* note 68; e.g., Rule 10, Sec. 101, following CAL. BUS. & PROF. CODE § 6068 (attorneys); *Hallman v. Comm. of Bar Examiners*, 65 Cal. 2d 447 (1966); *Ready v. Grady*, 243 Cal. App. 2d 113, 117 (1966).

80. Telephone interviews, *supra* note 68.

81. *Hallinan*, 65 Cal. 2d 447, 450; *In re Aklow*, 64 Cal. 2d 838, 840 (1966).

82. CAL. GOV'T CODE § 18935(f).

83. CAL. GOV'T CODE § 19572(k).

84. Personal interview with State Personnel Board, Sacramento, Calif., Jan. 18, 1971; memorandum to all state agencies on policy and practice in the evaluation of arrest and conviction records of applicants for State employment, April 21, 1967.

85. "That regular employment is a basis for successful living for the former offender, just as it is for the person who has never violated the law, is axiomatic." Randolph E. Wise, *Public Employment of Persons with a Criminal Record*, 6 NPPA JOURNAL, No. 2, April, 1960.

86. The Sacramento Bee, 3-part series on the saga of a parolee, Jan. 11, 1971, Sec. B, p. 1; Jan. 18, 1971, Sec. B, p. 1; Jan. 25, 1971, Sec. B, p. 1. Personal interview with an ex-convict, Sacramento, Calif., Jan. 24, 1971; Personal interview at 7th Step Foundation, Sacramento, Calif., Jan. 13, 1971; 3 CAL. WEST. L. REV. 121, 124 (1967); RUBIN, at 639.

employers to hire ex-convicts.<sup>87</sup> The efforts of this office have met with varying but increasing success.<sup>88</sup>

Reluctance of employers to hire ex-convicts may sometimes be based on the policies of bonding companies in insuring employers against losses caused by employees. A typical employee bond will automatically exclude persons with any kind of criminal record from coverage under the blanket bonds.<sup>89</sup> But a bonding company may still bond an ex-convict for employment on an individual basis if they can be reasonably certain that the bond will be safe.<sup>90</sup> This need not be a problem any longer, however, since the State Department of Human Resources Development will provide a \$10,000 employment bond on any ex-convict.<sup>91</sup> This \$10,000 bond can be used by any ex-convict who has secured employment either on his own or through the State Employment Office and regardless of whether it is state employment or private employment.

## II. PRESENT REMEDIES FOR RESTORATION OF RIGHTS

For the convicted felon who has proven himself to no longer be a criminal threat to society, the California Legislature has seen fit to provide three types of remedies to restore him as much as possible to his former position.

### DISMISSAL OF CONVICTION

The first remedy is a dismissal of conviction. If a person has been convicted of a felony<sup>92</sup> and is granted probation, after successful completion of probation, the convict can petition the court for expungement of his record of conviction.<sup>93</sup> This applies whether probation is granted without entry of judgment or probation is granted after the prison sentence is suspended.<sup>94</sup>

The purpose of granting probation is to assist in rehabilitation.<sup>95</sup>

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87. Telephone interview, Employment Office, State Dept. of Human Resources Development, Sacramento, Calif., Feb. 9, 1971.

88. *Id.*: Some employers are strictly opposed to hiring ex-convicts. Those that are more flexible often find that ex-convicts make better than average employees since an ex-convict will realize he has more at stake than usual. However, favorable employer attitudes are often found only for unskilled positions with little or no responsibility.

89. Telephone interview, U.S. Fidelity & Guaranty Co., Sacramento, Calif., Feb. 9, 1971.

90. *Id.*

91. Telephone interview, Employment Office, State Dept. of Human Resources Development, *supra*.

92. This remedy has been extended to apply to misdemeanants as well. CAL. PEN. CODE § 1203.4a.

93. CAL. PEN. CODE § 1203.4.

94. See 22 OP. CAL. ATT'Y GEN. 39 (1953).

95. CAL. PEN. CODE § 1203; *People v. Johnson*, 134 Cal. App. 2d 140, 143

Section 1203.4 of the Penal Code, the provision for dismissal of conviction upon successful completion of probation, was first enacted as part of the statutory scheme setting up probation as a method of assisting rehabilitation.<sup>96</sup> Cases have stated that the purpose of section 1203.4 is to relieve from further punishment, and restore rights to, one whose probation has resulted in his reformation and to effect complete rehabilitation.<sup>97</sup>

The procedure for obtaining a dismissal of conviction is relatively simple. Upon successfully completing his probation, the probationer may petition the court to withdraw his plea of guilty or nolo contendere, or to set aside the verdict of guilty if he pleaded not guilty, and have the accusation or information dismissed.<sup>98</sup> If the court finds any violations of probation, whether or not the probationer was previously charged with them, dismissal can be denied.<sup>99</sup> Otherwise, the language of the statute is mandatory, and the court cannot deny the petition of a person who meets the requirements on the ground that he failed to reform.<sup>100</sup> Then, in the words of the statute, he "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."<sup>101</sup>

The actual effect of a dismissal is not so complete as it might appear.<sup>102</sup> Although an early interpretation of section 1203.4<sup>103</sup> indicated that its effect was to legally wipe out the fact of conviction and in spite of the alleged purpose to effect complete rehabilitation, the legislature and the courts have been unwilling to grant such a full and complete expungement. The courts have interpreted "expunged" to mean only that it will be noted on the record of conviction that the charges have been dismissed.<sup>104</sup> Since the record of conviction still stands,<sup>105</sup> the ex-convict must still admit his prior conviction whenever such inquiries are made in employment applications, license applications or in any other connection. He may also indicate, of course, that the charges have been dismissed. However, the felon's right to vote will be

(1955); *People v. Cortez*, 199 Cal. App. 2d 839, 844 (1962); Comment, *Penal Rehabilitation Benefits Curtailed?* 2 STAN. L. REV. 221, 222 (1949).

96. Enacted as CAL. PEN. CODE § 1203, CAL. STATS. 1909, c.232, p.357.

97. *People v. Mojado*, 22 Cal. App. 2d 323, 325 (1937); *People v. Taylor*, 178 Cal. App. 2d 472, 478 (1960).

98. CAL. PEN. CODE § 1203.4.

99. *People v. Turner*, 193 Cal. App. 2d 243, 246 (1961).

100. *People v. Johnson*, 134 Cal. App. 2d 140, 144 (1955).

101. CAL. PEN. CODE § 1203.4.

102. Booth, *Expungement Myth*, 38 L.A. BAR BULL. 161 (1963); Zwerin, *Section 1203.4 Penal Code*, 36 CAL. S.B.J. 94 (1961).

103. *People v. Mackey*, 58 Cal. App. 123, 130 (1922).

104. 36 OP. CAL. ATT'Y GEN. 1 (1960); Baum, *Wiping Out a Criminal or Juvenile Record*, 40 CAL. S.B.J. 816, 819 (1965).

105. *Id.*

restored by a dismissal.<sup>106</sup> A dismissal will prevent use of the conviction to impeach the convict's credibility as a witness, unless he is testifying in a criminal action on his own behalf, in which case evidence of the prior conviction can still be used against him.<sup>107</sup> Furthermore, dismissal does not prevent use of the conviction in a subsequent prosecution for sentencing purposes.<sup>108</sup> A dismissal will terminate registration requirements of sex offenders<sup>109</sup> and narcotics offenders<sup>110</sup> unless the defendant has been adjudged to be a mentally disordered sex offender in a civil proceeding.<sup>111</sup> But a dismissal does not relieve a felon from the criminal sanctions against his owning or possessing a concealable weapon.<sup>112</sup>

More importantly, however, a dismissal of conviction has no effect at all on the licensing by administrative agencies. There is no automatic reinstatement of any license; nor are any of the licensing agencies bound by the fact of dismissal when revoking, suspending or denying a license on the basis of a criminal conviction.<sup>113</sup>

The first case to indicate this fact was *In re Phillips*,<sup>114</sup> which involved an attorney who was given probation for a crime of moral turpitude and whose conviction was subsequently dismissed under section 1203.4 proceedings. The court held that dismissal of the conviction would not prevent disbarment because discipline of attorneys is peculiarly within the province of the courts and thus not subject to legislation.<sup>115</sup>

*Phillips* was followed by *Meyer v. Board of Medical Examiners*<sup>116</sup> which upheld the suspension of a medical license for a felony conviction. The *Meyer* court relied on, and reached the same result as in, the *Phillips* decision. But in the process, it established the now accepted doctrine that the denial, suspension or revocation of a license is not a "penalty" within the meaning of section 1203.4.<sup>117</sup>

Thus, it has been reasoned that it would unduly hamper the discretion of licensing boards if they were bound to recognize statutory rehabilitation and that the felon must make a positive showing of re-

106. *Truchon v. Toomey*, 116 Cal. App. 2d 736, 745 (1963).

107. CAL. EVID. CODE § 788; *People v. O'Brand*, 92 Cal. App. 2d 752, 756 (1949).

108. *People v. Hainline*, 219 Cal. 532, 534, 535 (1933); *People v. Walters*, 190 Cal. App. 2d 98, 100 (1961).

109. CAL. PEN. CODE § 290; *Kelly v. Municipal Court*, 160 Cal. App. 2d 38, 45 (1958).

110. CAL. HEALTH & SAFETY CODE § 11853.

111. 52 OP. CAL. ATT'Y GEN. 118 (1969); CAL. WELF. & INST. CODE § 6302.

112. CAL. PEN. CODE §§ 1203.4, 12021.

113. *See, e.g.*, CAL. BUS. & PROF. CODE § 2765.

114. 17 Cal. 2d 55 (1941).

115. *Id.*

116. 34 Cal. 2d 62 (1949).

117. *Id.*

habilitation.<sup>118</sup> Although an offender was trusted with probation and subsequently proved himself to be worthy of such trust,

the law will not permit the dismissal of the proceeding in the criminal case to automatically restore or terminate the suspension of the license. With this classification [the regulation of certain professions through the issuance of license] the requirement of rehabilitation is not the statutory rehabilitation provided by Section 1203.4 of the Penal Code. An affirmative showing must be made by the applicant to the satisfaction of the licensing authority before he may be restored to his former position as a licensee.<sup>119</sup>

Virtually all of the licensing statutes referred to above have been amended to specifically exclude the effect of section 1203.4, based on the rule laid down in *Meyer*. A representative statute is as follows:

A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or any offense involving moral turpitude is deemed to be a conviction within the meaning of this article. The board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such a person to withdraw his plea of not guilty, or setting aside the verdict of guilty, or dismiss the accusation, information or indictment.<sup>120</sup>

The law is not clear on the effect of dismissal on a convict's right to hold public office<sup>121</sup> or a fiduciary position. Since a dismissal restores the right to vote<sup>122</sup> and since the privileges of an elector include the right to hold public office,<sup>123</sup> assuming that the right to vote can be equated to the right to be an elector, it could be argued that a dismissal also restores the right to hold public office. And since disqualification from holding public office is characterized as a penalty,<sup>124</sup> the argument would be that such penalty should be removed upon dismissal of conviction under section 1203.4. Furthermore, since statutes such as section 2600 treat the right to hold public office and the right to hold a position of trust the same as the right to vote, it would seem that the

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118. *Stephens v. Toomey*, 51 Cal. 2d 864, 872 (1959). See also, *Ready v. Grady*, 243 Cal. App. 2d 113; *Copeland v. Dept. of Alcoholic Bev.*, 241 Cal. App. 2d 186 (1966); 22 A.L.R. 255 (1923).

119. 51 Cal. 2d at 872.

120. CAL. BUS. & PROF. CODE § 2765 (nurses).

121. Booth, C.E.B., at 636.

122. See note 84 *supra* and accompanying text.

123. CAL. GOV'T CODE § 274.

124. 2 B. WITKIN, CALIFORNIA CRIMES, § 965 (1963).

dismissal should restore all three of these rights in the same way as it restores the right to vote. This conclusion would also be in keeping with the rehabilitative purpose of section 1203.4.

Thus, the dismissal of conviction is not without its shortcomings as a remedy for restoring the rehabilitated ex-convict to his prior position.<sup>125</sup> The only benefits that the dismissal actually provides are the restoration of the right to vote to those who do not already possess it, a partial restoration of the offender's credibility as a witness, and a release from registration requirements for all those who have not been adjudged mentally disordered sex offenders. While important benefits, these items are probably not as vital to the readjustment of the convict as employment in the occupation of his choice would be.

The force of this statute as a remedy was removed<sup>126</sup> when *Meyer* established that a dismissal had no effect on the discretion of licensing agencies.<sup>127</sup> Thus, in spite of statutory rehabilitation, the assumption that a person once convicted of a felony is still a person of bad character is allowed to continue for licensing purposes.<sup>128</sup>

So long as the record of conviction exists, the informal disabilities that are based on social prejudices will continue.<sup>129</sup> Private employers generally do not understand the significance of a dismissal of conviction, and, even if they do, they are justified in following the example of the licensing agencies in ignoring its significance.

## PARDONS

### A. *Pardons Based on a Certificate of Rehabilitation*

The second type of remedy, available to a felon who has spent time in a state penal institution in California<sup>130</sup> and who can prove he is rehabilitated, is a rehabilitative pardon from the Governor.<sup>131</sup> Any person who has been convicted of a felony and who has been released from a state prison or other state penal institution may apply for a certificate of rehabilitation from the superior court of the county in which he resides and a full pardon from the Governor.<sup>132</sup> If granted, the pardon

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125. The available remedy—usually dismissal or a pardon based on a certificate of rehabilitation—is frequently ineffective in removing the disability or restoring the right or privilege that concerns the client.

Booth, C.E.B. at 628.

126. Comment, *Penal Rehabilitation Benefits Curtailed?* 2 STAN. L. REV. 221 (1941).

127. See also, 51 Cal. 2d at 872.

128. *Ready v. Grady*, 243 Cal. App. 2d 113, 117 (1966).

129. Booth, C.E.B. at 622; Comment, 3 CAL. WEST. L. REV. 121 (1967).

130. CAL. PEN. CODE § 4852.01.

131. CAL. CONST. art. V, § 8.

132. CAL. PEN. CODE § 4852.01 *et seq.*

restores all civil and political rights of citizenship.<sup>133</sup>

The provisions for a rehabilitative pardon were originally enacted in 1943 to provide a uniform and objective standard whereby all persons who desired to have their records clear could do so without having to rely on the subjective standards of the Governor's staff.<sup>134</sup>

The procedure for obtaining a pardon based on a certificate of rehabilitation is far more complicated than the procedure for obtaining a dismissal of conviction after probation.<sup>135</sup> There is a required period of rehabilitation after release from prison during which the felon must reside in the state under supervision of the local law enforcement officer before he is eligible to apply for this remedy. The felon must first file with the county clerk in the county of his residence a notice of intention to apply for a certificate of rehabilitation and pardon.<sup>136</sup> This notice begins the period of rehabilitation. The notice can be filed while the felon is still on parole, but the felon must be off parole before applying for a certificate of rehabilitation.<sup>137</sup> Petitioner must agree to supervision and submit to any reasonable conditions imposed by the local law enforcement officer—either the chief of police or the county sheriff.<sup>138</sup> However, the supervision often is in name only and then only perfunctory.<sup>139</sup>

The period of rehabilitation which begins when the notice of intention is filed requires at least three years residence within the state, plus thirty days for each year of the maximum sentence imposed for the crime of which the petitioner was convicted.<sup>140</sup> Life sentence is considered to be fifty years for this purpose.<sup>141</sup> It should be noted that for rehabilitation purposes, it would probably be more logical to measure the thirty day requirement by the actual sentence served rather than the present policy of measuring by the maximum sentence imposed.

During this period of rehabilitation, the petitioner must live "an honest and upright life, shall conduct himself with sobriety and industry, shall exhibit good moral character, and shall conform to and obey the laws of the land."<sup>142</sup> After expiration of this time, petitioner

133. CAL. PEN. CODE § 4852.17.

134. Telephone interview, Richard A. McGee, President of the American Justice Institute and former Director of the Dep't of Corrections, appointed by Governor Warren, Sacramento, California, April 2, 1971.

135. See Milligan, *Certificate of Rehabilitation and Application for Pardon in California*, 43 CAL. S.B.J. 112 (1968).

136. CAL. PEN. CODE § 4852.01.

137. 8 OP. CAL. ATT'Y GEN. 113, 115 (1946).

138. CAL. PEN. CODE § 4852.02.

139. Personal interview, Dep't of Corrections, Sacramento, California, March, 1971.

140. CAL. PEN. CODE § 4852.03.

141. *Id.*

142. CAL. PEN. CODE § 4852.05.

may file in the superior court of the county in which he resides a petition for ascertainment and a declaration of the fact of his rehabilitation.<sup>143</sup> Notice of this hearing is sent to the district attorney, the chief of police, the county sheriff, the district attorney of each county in which the petitioner was convicted of a felony, and the office of the Governor.<sup>144</sup> The court can require production of all reports and records it deems necessary.<sup>145</sup> No filing fees or court costs<sup>146</sup> or attorney fees<sup>147</sup> are to be charged. The district attorney is required to make an investigation of the petitioner and report the results to the court.<sup>148</sup>

If the court then finds the petitioner rehabilitated and presently a person of good moral character, it will so declare and this declaration is a certificate of rehabilitation.<sup>149</sup> The declaration is then sent to the Governor and constitutes an application for a pardon.<sup>150</sup> If the Governor concurs, which he usually does,<sup>151</sup> a pardon will be granted. If the petitioner has been convicted of more than one felony, the California Supreme Court must also concur before the Governor grants a pardon.<sup>152</sup>

## B. *Direct Pardons*

The direct pardon should be distinguished from a pardon based on a certificate of rehabilitation. A convict can at any time make direct application to the Governor for a pardon.<sup>153</sup> The application is routinely referred to the Adult Authority for their review and recommendations in accordance with their advisory responsibilities.<sup>154</sup> Direct pardons are granted for innocence or for rehabilitation.<sup>155</sup> A pardon based on innocence allows the person to be indemnified for having

143. CAL. PEN. CODE § 4852.06.

144. CAL. PEN. CODE § 4852.07.

145. CAL. PEN. CODE § 4852.1.

146. CAL. PEN. CODE § 4852.09.

147. CAL. PEN. CODE § 4852.2.

148. CAL. PEN. CODE § 4852.12.

149. CAL. PEN. CODE § 4852.13.

150. Kingsley, *The Work of the 1943 California Legislature: Criminal Law*, 17 So. CAL. L. REV. 1, 44 (1943).

151. Telephone interview with Governor's Office, Sacramento, Calif., Feb. 10, 1971: The Governor generally approves, unless in the time lapse between the judicial declaration and the executive review, there have been arrests. Then the applicant is allowed to reapply later. A total of 21 rehabilitative pardons and 6 direct pardons were granted by the Governor in 1970. Report from the Governor, Acts of Executive Clemency of California, 1970.

152. CAL. PEN. CODE § 4852.16.

153. CAL. CONST. art. V, § 8; CAL. PEN. CODE § 4800 *et seq.*

154. Booth, C.E.B. at 625; Kingsley, *Work of the 1937 Legislature: Criminal Law*, 11 So. CAL. L. REV. 62, 85 (1937); Meese and McNerny, Executive Clemency, CONTINUING EDUCATION OF THE BAR, CALIF. CRIMINAL LAW PRACTICE II, at 705-708 (1969) [hereinafter cited as Meese & McNerny, C.E.B.].

155. Meese & McNerny, C.E.B. at 698.



been wrongfully convicted, and his conviction cannot be used against him in any way.<sup>156</sup>

Direct pardons based on rehabilitation generally are not granted unless the applicant is not eligible to apply for a pardon based on a certificate of rehabilitation, and, when granted, often require a showing similar to, and often for an even longer time than, that required for a certificate of rehabilitation.<sup>157</sup> It has been said that a pardon of this type "blots out guilt and allows the person to be born anew."<sup>158</sup> This has not been shown to be an accurate statement.<sup>159</sup> In practice, the effect of this type of pardon is identical to that of a pardon based on a certificate of rehabilitation.<sup>160</sup>

### C. *Effect of Pardons*

Although both a court and the Governor concur that the ex-convict is rehabilitated based on a minimum three years plus the thirty day requirement, the actual effect of a pardon based on a certificate of rehabilitation is much like that of a dismissal of conviction. As with a dismissal the fact of conviction still stands and the convict must still admit, when asked, that he has been convicted of a crime.<sup>161</sup> But unlike the dismissal, the pardon clearly restores all rights of citizenship, including the right to hold public office and hold a position of trust as well as the right to vote.<sup>162</sup>

The ex-convict's credibility as a witness is now totally restored. The fact of the prior conviction can not be used to impeach his credibility even if testifying on his own behalf in a subsequent prosecution.<sup>163</sup> But the fact of the prior conviction can still be used for sentencing purposes if subsequently convicted of another crime.<sup>164</sup> The ex-convict is still not allowed to own or possess a concealable firearm. However the Governor has discretion to restore this right if he so desires, unless the crime convicted of was one involving the use of a dangerous weapon, in which case the ex-convict has forfeited this right.<sup>165</sup> Registration require-

156. CAL. PEN. CODE §§ 3045, 4900 *et seq.*; 28 OP. CAL. ATT'Y GEN. 178, 182 (1956).

157. Meese and McInerny, C.E.B., at 705-708.

158. *Ex parte* Garland, 4 Wall. 333, 380 (1866); *People v. Bowen*, 43 Cal. 439, 442 (1872).

159. *People v. Biggs*, 9 Cal. 2d 508, 511 (1937); 43 CAL. S.B.J. 112 (1968).

160. Meese & McInerny, C.E.B., at 708.

161. 9 Cal. 2d at 512.

162. 1945 amendment to CAL. PEN. CODE § 4822.15 deleted the sentence which provided that the right to hold public office and the right to act as a trustee were not restored by a certificate of rehabilitation.

163. CAL. EVID. CODE § 788.

164. 9 Cal. 2d at 513.

165. CAL. PEN. CODE §§ 12021, 4854.

ments for sex and narcotics offenders are likewise terminated.<sup>166</sup> However, reinstatement to practice a licensed profession is not automatic and the fact of conviction still remains as a basis for denial of a license.<sup>167</sup>

The statutory effect of a full pardon is to restore to the convict "all the rights, privileges and franchises of which he has been deprived in consequence of said conviction," with special exception that it shall not interfere with the authority of the Board of Medical Examiners.<sup>168</sup> The pardon based on a certificate of rehabilitation is further restricted, however, by the provision that it does not require the reinstatement of the right or privilege to practice or carry on any profession or occupation which requires a license and that it shall not interfere with the authority of the Board of Medical Examiners, any licensing agency which licenses persons to apply their art or profession on the person of another, or the State Bar of California.<sup>169</sup> Thus, although the person who once committed a crime has since shown good moral character for a minimum of three years plus the thirty day requirement, his character can still be questioned by licensing agencies on the basis of his prior conviction alone.<sup>170</sup>

It can be seen then that a rehabilitative pardon also has its shortcomings as a remedy for restoring the former felon to an equal position in society. As a practical matter, many ex-convicts never take advantage of this remedy for various reasons. Many are reluctant to submit to the extra supervision for such a long period of time.<sup>171</sup> They must reside in the state during the entire period. Also there is a general belief among many ex-convicts that it would be impossible to actually get a pardon, and thus they are discouraged from trying.<sup>172</sup> So long as the record of conviction exists and must be admitted to, the informal disabilities from conviction will continue.<sup>173</sup> And the conviction can still be relied upon by licensing agencies as evidence of bad moral character.<sup>174</sup>

The existence of the present remedies indicates the increased social awareness relating to ex-convicts. But they are not complete in effecting their purpose. Most would agree that to complete rehabilitation, indi-

166. CAL. PEN. CODE § 290.5.

167. *Feinstein v. State Bar of Calif.*, 39 Cal. 2d 541, 547 (1952); *In re Lavine*, 2 Cal. 2d 324 (1935). But see *In re Emmons*, 29 Cal. App. 121 (1915); 1 B. WITKIN, CALIFORNIA PROCEDURE, Attorneys, § 95 (2d ed. 1970); 22 A.L.R.2d 255 (1922).

168. CAL. PEN. CODE § 4853.

169. CAL. PEN. CODE § 4852.15.

170. See Note, *The Effect of a Pardon on License Revocation and Reinstatement*, 15 HAST. L.J. 355 (1964).

171. Booth, C.E.B. at 629.

172. Personal interview, 7th Step Foundation, Sacramento, Calif., Jan. 13, 1971.

173. See note 104 *supra*.

174. See notes 140-142 *supra*.

vidual rights must be restored to the ex-convict except when the interest of protecting the public is overriding.<sup>175</sup>

California has indicated that its policy relating to convicts is primarily rehabilitation.<sup>176</sup> And it has gone so far as to provide procedures whereby an ex-convict can prove that he is rehabilitated. However, even after finding the ex-convict to be rehabilitated, the state continues to treat the ex-convict as a threat to society through its laws that provide that statutory rehabilitation is not sufficient for purposes of licensing agencies that require good moral character.

It is to the best interest of everyone that ex-convicts are provided with incentive to rehabilitate themselves and pursue the occupation of their choice. Yet the continual requirement of an extra showing of proof of good character may frustrate rehabilitation and prevent the most efficient use of the person's talents.

Although the informal disabilities resulting from conviction are primarily based on social prejudices, it is submitted that they could be reduced if the state set the example by treating the person who is rehabilitated by statute as in fact rehabilitated.

### III. PROPOSAL FOR PROTECTION OF RIGHTS OF EX-CONVICTS

A legislative proposal to complete the state's policy regarding rehabilitation, to provide incentive to ex-convicts to rehabilitate themselves, and to insure a second chance to those convicts who have rehabilitated themselves would be the following:

A license shall not be denied on the sole basis of a prior conviction of a felony not directly related to the occupation for which license is sought when:

1. The conviction has been set aside by dismissal proceedings,  
or
2. A pardon or certificate of rehabilitation has been granted.

The effect of this proposal would be to create a legal presumption of rehabilitation once a person has obtained either a dismissal of conviction, a certificate of rehabilitation or a direct pardon.

A licensing agency should not be able to find bad character and thus deny a license on the basis of a prior conviction alone if the convict has proved himself to be rehabilitated. A dismissal of conviction is not granted unless the convict was trusted with probation and subsequently proved himself to be worthy of such trust. And a certificate of rehabilitation is even more proof of good character because it indicates

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175. RUBIN, at 622, 638-44; Tappan, *Loss and Restoration of Civil Rights of Offenders*, NPPA YEARBOOK, 1952, at 88.

176. *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 687 (1960).

a minimum of three years plus the thirty day requirement of supervised good conduct. There is no minimum time required for a direct pardon, though in fact a much longer period of time is usually involved. In these instances, the burden of proof should be shifted to the licensing agency to show that the applicant is not of good character and if so, why he is not fit for the particular occupation. If the licensing agency fails to carry this burden, the applicant should be granted relief by a court of law on the grounds of abuse of discretion by the concerned licensing board.

If the prior conviction is directly related to the occupation, there may be a reason for a stricter policy. Examples of such situations are the laws in existence now which absolutely bar a prior sex offender from being a teacher<sup>177</sup> and bar a prior embezzler from being an accountant.<sup>178</sup> In these instances when there is a direct relationship between the crime committed and the occupation, the public interest should prevail. Furthermore, a positive policy such as this on the part of the state may indirectly improve the attitude of private employers and bonding companies.

Those ex-convicts that are in fact rehabilitated should be assured of a second chance and all ex-convicts should be provided with incentive to rehabilitate themselves.

Thus it is clear that the effects of criminal conviction remain long after formal punishment has been completed. To the extent that these continuing effects do not serve a legitimate public interest, they must be removed in the interest of the individual.

California has stated that its policy with respect to ex-convicts is primarily rehabilitation, and has gone so far as to provide detailed procedures for ex-convicts to prove they are rehabilitated. Yet the stigma of the prior conviction is never removed as society continues to take its last ounce of flesh.

A proposal to truly wipe out the legal effects of a prior conviction, as far as licensing is concerned, for the man that has proved himself to be rehabilitated would allow us to complete our policy of rehabilitation.

*Gail Ohanesian*

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177. CAL. EDUC. CODE § 13130.

178. CAL. BUS. & PROF. CODE § 5100(b).